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No. _____

In The

Supreme Court of the United States

October Term, 1994

UNION SCHOOL DISTRICT, CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents, JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do parents of a disabled pupil have a right to family reimbursement to maintain a second dwelling when the parent has unilaterally placed the pupil in a private day program beyond a reasonable commute distance from the family's residence?

2. Are parents of disabled pupils entitled to reimbursement for unilateral placements when they have ignored the procedural safeguards that were established for their benefit under the Individuals With Disabilities Education Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were:

1. Petitioner Union School District, plaintiff and appellant below.

2. Petitioners California Department of Education, Bill Honig as Superintendent of Public Instruction, defendants and cross-claimants against the Smith-defendants, and appellants below.

3. Respondents B. Smith by and through his parents Donna and John Smith (under seal), defendants, cross-defendants and appellees below.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, California Department of Education, the State Superintendent of Public Instruction, and Union School District respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 1, 1994.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 15 F.3d 1519 (9th Cir. 1994). It is reprinted at pages App. 1-19 of Appendix A to this Petition. The Order Re: Cross Motions For Summary Judgment and Judgment of the District Court are unreported and are reprinted at pages App. 21-42 of Appendix B to this Petition.

STATEMENT OF JURISDICITON

Petitioner, Union School District, initially invoked federal jurisdiction under 20 U.S.C. § 1415 by bringing suit in the United States District Court for the Northern District of California. Judgment was entered against all petitioners on August 28, 1991. On appeal, the Ninth Circuit Court of Appeals entered an opinion affirming the district court's judgment which was filed on February 1, 1994. Petitioners California Department of Education and the Superintendent of Public Instruction, joined by Union

School District, filed a Petition for Rehearing and a Suggestion for a Rehearing En Banc, which was denied on June 9, 1994.

The jurisdiction of this Court, to review the opinion of the Ninth Circuit Court of Appeals, is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its governing regulations, 34 C.F.R. Part 300, and Part 30 of the California Education Code, commencing with § 56000 are set forth in Appendix C at pages App. 43-54 of this petition.

STATEMENT OF THE CASE

A. Facts.

Petitioners adopt the district court's statement of the facts as found in Appendix B, pages App. 21-27 of this Petition.

B. Summary Of The Arguments.

This case involves the question of whether parents encounter any limits on the unilateral actions that they can take in securing special education and related services for their disabled children under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

With no analysis of the relevant arguments presented by these petitioners, the Ninth Circuit erroneously concluded that because the IDEA at 20 U.S.C. § 1401(a)(17), states that disabled pupils are entitled to "transporation . . . and other supportive services . . . as may be required to assist a child with a disability to benefit from special education", it necessarily follows that:

> if a child's appropriate special education placement is at a *non*-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education. [Emphasis added]

No one disputes that disabled pupils may be entitled to residential school programs and necessary transportation services. But with its cursory analysis of what constitutes a "related service", the Ninth Circuit ignored the difficult issues and these questions of exceptional importance:

1. Are *families* of disabled pupils also entitled to reimbursement for living expenses?

2. Are parents of disabled pupils free to place their children at public expense in *any day* program they desire, regardless of its location and without reference to the procedural safeguards established *for their benefit*, whenever disagreements between the school and the parent arise?

This appeal is not about whether Bernard, the disabled pupil, was offered a free appropriate education

under the IDEA. It is about the limits on Bernard's entitlement under the IDEA. It is about whether his parents, Doctor and Mrs. Smith (the Smiths), were entitled to seek a *day* treatment program in Los Angeles, over 400 miles from their residence in San Jose, and establish a *second dwelling* in Los Angeles *at public expense.*

It is also about parents' responsibilities under the IDEA. The Ninth Circuit's decision effectively excuses the Smiths' disregard for the procedural safeguards which Congress established to assist parents in the timely resolution of disputes.

Ignoring the legislative history, the statute and the case law that would require harsher results for the disabled pupil's parents, the district court and the Ninth Circuit stretched the intent and plain language of the IDEA to conclude that the State and school district are required to reimburse the Smiths for the actual expenses of establishing a second dwelling in Los Angeles: $895 per month plus utilities (at $200 a month or subject to proof), and airfares for Bernard and his mother to and from Los Angeles at the beginning and end of the school year and during school holidays.

Excusing the parents from any responsibilities under the IDEA, the Ninth Circuit has distorted the purpose of the IDEA and transformed it into a damage statute against school districts. Treating "appropriate education" as though educational decision-making is an exact science, the Ninth Circuit has given parents the freedom to ignore the carefully crafted procedures of the IDEA and to unilaterally purchase any program for their child

whenever they disagree with the school district's educational offering. While excusing the parents from any obligation under the IDEA, the Ninth Circuit holds school districts to an unrealistic standard of exact compliance, with no room for even a good faith deviation.

The Ninth Circuit also erred by failing to recognize that the facts and issues of this case are significantly distinguishable from both *Burlington School Committee v. Department of Educ.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

The Court in *Burlington, supra*, 471 U.S. at 369, required that parent placements be "proper under the Act". The Ninth Circuit failed to address whether second dwellings for parents are "proper under the Act", or whether parent-placements that are made without regard to the procedural safeguards are "proper under the Act." Likewise, while the Ninth Circuit summarily concludes that "the language and spirit of the IDEA encompass reimbursement for *reasonable* . . . lodging expenses" [emphasis added], it never directly addressed the issue of whether paying for parents' second dwellings is "reasonable".

This case involves questions of exceptional importance to the school districts within the Ninth Circuit and nationwide. The Ninth Circuit, standing alone among the circuits, has twice ruled that payment for family homes is a legitimate cost to be born by the public schools. *See* the related case of *Ojai Unified School District v. Jackson* (No.

93-2074), also before this Court on a petition for certiorari. It is essential that the following arguments, ignored by the Ninth Circuit and district court, be heard.

REASONS FOR GRANTING THE WRIT

I. WHILE RESIDENTIAL PROGRAMS FOR PUPILS ARE CLEARLY AUTHORIZED, NOWHERE DID CONGRESS CONTEMPLATE THE RELOCATION OF FAMILIES AT PUBLIC EXPENSE.

The courts below failed to make the clear distinction that Congress made between "related services" and "residential placements", thus missing the fact that lodging costs are limited to placements made in residential programs.

A. "Lodging"[1] Costs Are Not Related Services.

Relying on the "related services" provision of the IDEA, 20 U.S.C. § 1401(a)(17), with emphasis on the broad language that related services include "other supportive services . . . as may be required to assist a child with a disability to benefit from special education", the Ninth Circuit concluded that "lodging" costs are reimbursable related service expenses. However, a careful analysis of the IDEA leads to the conclusion that lodging costs are not "related services".

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[1] "Lodging" is the term used by the panel of the Ninth Circuit, a curious euphemism for reimbursing parents for second dwellings.

A fundamental rule of statutory interpretation is that when presented with a listing of legislative items that include but are not limited to those specifically listed, courts will consider the like nature of other items suggested for implicit inclusion. Without such a limitation on the courts' powers of interpretation, the courts would assume the role of legislative bodies, in violation of the Constitutional division of powers.

Here, one need only look at the types of "related services" that Congress specifically included in the IDEA, and that have been carefully defined by the Secretary of Education in the Code of Federal Regulations, to conclude that lodging for children *and* parents was certainly not one of them, to wit: audiology, counseling services, early identification and assessment, medical services for determining the disability, occupational therapy, parent counseling and training, physical therapy, psychological services, recreation services, rehabilitation counseling services, school health services, social work services, speech pathology, and transportation. 34 C.F.R. § 300.16. The Note following this regulation is also instructive: "The list . . . is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy). . . . "

Lodging is not mentioned as a related service, and common sense indicates that it is unlike any other related service explicitly included by Congress. The panel erred in summarily concluding that lodging is a related service.

Turning to the clause that states "as may be required to assist a child with a disability to benefit from special

education" does not save the Ninth Circuit's cursory conclusion that lodging is a related service. Obviously, without food, water, clothing, a roof over one's head, etc., it may be difficult, if not impossible, for a disabled pupil to benefit from his/her special education. However, it should come as no surprise to the Court that education does not pick up every such need as a related service.

There are limits to what Congress included as "required to assist a child . . . to benefit from special education", and Congress has set those limits by listing a series of like items that may be defined as "related services". Second dwellings for parents are not included in that listing. Neither is "lodging".

In fact, Congress gave explicit and *separate* treatment to the issue of paying for lodging.

B. Congress And The Secretary Of Education Specifically Treated Residential Placements As Residential Schools, Not Second Dwellings For Families.

Congress makes only one reference to residential placements in the IDEA and it is in the context of *residential schools,* not second dwellings or lodging for relatives of disabled pupils.

In defining "free appropriate public education", Congress stated that it includes "pre*school,* elementary, or secondary *school* education in the State involved" (20 U.S.C. § 1401 (a)(18)) and Congress defined elementary and secondary *schools* to include *"residential schools"*. (20 U.S.C. §§ 1401 (a)(9) and (10)). In clarifying the scope of a "free appropriate public education" (34 C.F.R. Subpart C),

the Secretary of Education also makes his only reference to residential placement: "If placement in a public or private *residential program* is necessary *to provide* special education and related services to a child . . . *the program,* including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 [emphasis added].

Thus, while residential schools for *pupils* were clearly contemplated by Congress as part of a "free appropriate public education", neither Congress nor the Secretary of Education intended that school districts pay for second dwellings for families so that parents could enroll their disabled children in *day* programs of their choice. They clearly limited the residential option to *residential schools or residential programs.*

The Ninth Circuit's reliance on the Congressional finding that "familes are often forced to find services outside the public school system, often at great distance from their residence and at their own expense" (20 U.S.C. § 1400(b)(6)) is *no* support for its conclusion that Congress intended parents to be able to move freely around the country at the expense of the public educational system. It is simply a recognition by Congress that states participating in the IDEA must now offer appropriate programs locally or place pupils in residential schools at no cost to the parents.

To summarize, petitioners contend that the Smiths are not entitled to reimbursement for "lodging" because second dwellings for parents are nowhere authorized by the IDEA, nor can such be divined from Congressional intent. While Congress clearly recognized that, to provide

an appropriate education to disabled pupils, the public schools may find it necessary to utilize residential school placements, nowhere did Congress express its desire that parents be allowed to move with the pupils at public expense. Granted, keeping parents and children together may be the best possible educational choice, but this Court has previously recognized that the IDEA does not require the "best".

II. THE PROCEDURAL SAFEGUARDS ESTABLISHED BY CONGRESS LIMIT THE PARENTS' RIGHT TO TAKE UNILATERAL ACTION

A. Parents Are Not Free To Ignore The Procedural Safeguards Of the IDEA.

The Ninth Circuit ignored the Smiths' dilatory pursuit of the IDEA procedures.

In *Board of Educ., Etc. v. Rowley,* 458 U.S. 176, 187-190, 191-197, 204-207, 208-209, (1982) this Court recognized the importance that Congress placed on the procedural safeguards of the IDEA. Unfortunately, the Ninth Circuit seems to have viewed this Congressional emphasis as requiring the school district to dot every "i" and cross every "t", while allowing parents to disregard the law.

The legislative history, upon which this Court relied in *Rowley* is instructive (*Id.* at 179-180). Congress was clearly concerned that parents of disabled pupils were being denied access to any meaningful education, without any recourse. [1975] U.S. Code. Cong. & Admin. News, 1425, 1430. Congress stated:

> Parents of handicapped children all too frequently are not able to advocate the rights of their children. . . . It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity . . . S.6 [the IDEA] takes positive steps to ensure that the rights of children and their families are protected.

Id., at 1433.

Thus, Congress established an elaborate set of procedural safeguards including, but not limited to, the right to participate in meetings to develop the pupils's individualized educational program (IEP), the right to administrative hearings when they disagreed with the school district's proposal, the right to present complaints of noncompliance to the state educational agency, and the right to receive a remedy from the state when the district failed to comply. *Id.*, at 1432, 1435-1436, 1438, 1441, 1448, 1449, 1451, 1452.

These procedures were designed to give parents access to the system, not full control, and they were not designed as a one way street. In order to be entitled to the benefits of the law, parents are no more at liberty to ignore the IDEA procedures than are school districts.

Two cases are instructive on this point.

In *Burlington, supra,* this Court stressed the risk the parents take when acting unilaterally:

> This is not to say that § 1415(e)(3) [the "stay-put" provision] has no effect on parents. . . . [W]e think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, do so at their own financial risk.

Burlington School Committee, supra, 471 U.S. at 372-374.

In *Doe by Gonzales v. Maher,* 793 F.2d 1470, (9th Cir. 1986), *aff'd. sub nom Honig v. Doe,* 408 U.S. 305 (1988), the Ninth Circuit recognized that parents have the duty to exercise their administrative rights when they disagree with the school district's proposal:

> [A]lthough formulation of an IEP is ideally to be achieved by consensus . . . sometimes such agreement will not be possible . . . If not, *the agency has the duty to formulate the plan to the best of its ability* . . . but must afford the parents a due process hearing. . . . *Similarly the parents have a right to a due process hearing should they believe that the IEP drafted by the local agency conflicts with consensus reached at the meeting.* Any party aggrieved by the findings and decisions made during such due process hearings may seek judicial review under 20 U.S.C. § 1415(e)(2).

Doe v. Maher, supra, 793 F.2d at 1489-1490 (9th Cir. 1986). [Emphasis added].

This Court also affirmed the Ninth Circuit's holding that the sate, under 20 U.S.C. § 1414(d), has the obligation to act on complaints of non-compliance by providing direct services to individual pupils, a duty that the state petitioners note cannot be fulfilled if parents *fail to inform*

the state of the failure of the school district through established complaint procedures. *Honig v. Doe, supra,* 484 U.S. at 328; *Doe v. Maher, supra,* 793 F.2d at 1491-1492.

Sitting on one's rights was not contemplated by Congress. In the final Senate debate on the legislation, Senator Williams, a champion of the IDEA, stated:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. . . . Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be *commenced* and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

121 Cong. Rec. 37, 416 (1975). [Emphasis added].

All of these procedural safeguards fit neatly into a package designed to provide *swift* resolution to disputes between parents and school districts. They cannot be ignored.

B. The Smiths Acted In Disregard Of These Procedural Safeguards.

In June, while Bernard was in a placement to which they had agreed and while negotiations for the next IEP were under way, the Smiths unilaterally relocated Bernard and Mrs. Smith to an apartment in Los Angeles so that Bernard could attend a day treatment program of the Smiths' choice, *without first requesting a new IEP meeting.*

Three weeks later they demanded payment for the placement. When the district refused, the Smiths took no action to notify the State of the district's failure to recognize their lawful residency (nor did they notify the State of any other alleged violations) but simply continued the unilateral placement.

When the district conducted an IEP meeting in September, the Smiths noted their agreement with the goals, objectives and services and their disagreement with the placement offer, and then simply continued Bernard's placement in their unilateral choice. Requesting a hearing in October (four months after the initial unilateral placement) the Smiths finally pressed their administrative remedies in January, seven months after their initial unilateral action and six months after the district had originally offered the IEP placement with which the Smiths disagreed.

Petitioners contend that had the Smiths bothered to appropriately exercise any one of these procedures upon which Congress and this Court has placed so much importance the results of this case would have been quite different.

As an example, visualize the predicament of proof that the parents pose for a school district when a parent refuses an *untried* district proposal, places the pupil unilaterally, and then presents to the hearing officer glowing, *empirical* evidence as to the progress the pupil made in that actual placement, as against the speculative proof of

appropriate placement the district has to offer.[2] By waiting seven months after the unilateral placement to formally contest the district's placement, the Smith's manipulated the procedural safeguards.[3]

Congress did not say that when districts make inappropriate proposals they are acting unlawfully. Rather, Congress recognized that there would be honest differences of opinion over what is appropriate for a child. Thus Congress set up procedural safeguards to establish an even playing field for the resolution of such disputes. Congress did not intend for courts to allow parents to manipulate the evidence by ignoring the procedures of the IDEA.

Neither the decision in *Burlington* nor *Carter, supra,* protect the Smiths. In those cases, the parents exercised their rights after a dispute arose. Here, by unilaterally placing the pupil *prior* to any disputed offer from the district, the Smiths avoided established dispute resolution procedures and manipulated their rights.

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[2] There is some evidence on the record, contested only by the parents, that Bernard made progress in the district's program in which he participated briefly before the parents moved him. It should be remembered that Bernard was a preschooler and rapid progress in any program could be expected simply as a result of his age.

[3] This is becoming a common tactic of parent advocates since this Court's first decision concerning unilateral placements in *Burlington.*

C. Ignoring The Smith's Disregard For The Law, The Ninth Circuit Penalizes The District For A *De Minimis* Procedural Error.

Stretching for a reason to force the district to pay for the parents' unilateral placement, the Ninth Circuit makes much of the fact that the district, after the parents rejected the formal IEP proposal, made another offer verbally, without conducting an IEP meeting. Petitioners fail to see the relevance of this omission in the overall facts of this case. It is clear that the Smiths were prepared to accept nothing less than their unilateral placement. They had visited the placement verbally offered by the district, but they verbally rejected it. Had the district made the offer in writing in an IEP meeting would the Smiths have acted any differently?

Courts facing the issue of procedural violations have noted that the purpose of the procedural safeguards is to insure the full participation of parents. *See, e.g., Doe v. Alabama State Department of Education, et al.*, 915 F.2d 651, 661-662 (11th Cir. 1990). In denying relief for procedural violations, the Eleventh Circuit, in *Doe v. Alabama*, held:

> Because the notice deficiencies in this case had no impact on the Does' full and effective participation in the IEP process and because the purpose of the procedural requirement was fully realized in this case, we agree with the district court that there has been no violation in this case which warrants relief.

Id. at 662.

The Ninth Circuit has stated:

> Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of

> educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of FAPE.

W.G.; B.G. v. Target Range School District, 960 F.2d 1479, 1484 (9th Cir. 1992) [cites omitted.]

The parents were not prejudiced by the verbal offer of placement made by the district. The Smiths refused the verbal offer and continued to insist on the Los Angeles program. They would have acted no differently if the program had been offered in writing. They only exercised their rights to a hearing when it became clear to them that the district was not going to *voluntarily* fund their unilateral placement.

By catching the district on a procedural error while ignoring the parents' disregard for the law, the Ninth Circuit has turned the IDEA into a damage statute that it was never intended to be.

III. THE COURTS' POWER TO PROVIDE EQUITABLE RELIEF IS NOT LICENSE TO REWRITE THE LAW

The IDEA is not an "all or nothing" statute. Congress did not state that if a school district in good faith makes a proposal that is later found to be inappropriate the parent takes all. Indeed, this Court in *Burlington* and *Carter, supra*, has clearly held that parents' demands must be "proper under the Act", and they must also be "reasonable".

Petitioners argue that unlike the unilateral actions of the parents in *Burlington* and *Carter,* the Smiths' placement was not "proper" *because it was done without regard to the law and the procedural safeguards.* Furthermore, in *Carter, supra,* 126 L.Ed.2d at 294, the Court held that while equitable considerations are appropriate in fashioning relief, "[t]otal reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable" and stated that courts "*must* consider the appropriate and reasonable level of reimbursement that should be required." [Emphasis added] The Ninth Circuit failed to make any such consideration.

Even assuming, *arguendo,* that the district-proposed placement was inappropriate, reimbursement to the parents in this case for their unilateral placement meets none of the standards for equitable relief established by this Court.

First, the unilateral placement was not "proper under the Act" because the IDEA does not authorize placement in distant day programs that require second dwellings for families of the disabled pupil at public expense.

Second, and just as important, the parents' actions were not "proper under the Act" because the parents eschewed the proper exercise of the procedural safeguards established for their benefit.

Third, in granting total relief to the parents for all expenses, including their second dwelling, the Ninth Circuit failed to consider the reasonableness of that remedy.

The state petitioners argued below (conceding no more than that it is impossible to know at this point whether the district's proposal in September would have been appropriate and that the hearing officer, the district court and the panel were correct in concluding that the day program in Los Angeles provided an appropriate program) that a "reasonable" and equitable remedy could have been devised. The parents could have been reimbursed for only the costs of the day program (approximately $40,000) and the transportation. By ordering reimbursement for their "lodging" as well, the Ninth Circuit has sent a message to parents nationwide that the IDEA procedures need not be followed: that it is to the parents' advantage to simply make a unilateral placement, deny the school district access to the pupil, claim empirical evidence as to the appropriateness of the placement, and then turn to the law.

CONCLUSION

Issuing the writ will give this Court the opportunity to re-establish the *limits* that Congress and this Court in *Rowley* recognized when guaranteeing disabled pupils the right to a free appropriate public education.

Issuing the writ will give this Court the opportunity to re-establish some order to the carefully crafted procedures that Congress designed, sending a message to parents that they are no more free to manipulate the system than is the system free to manipulate them.

Because the District Court and Ninth Circuit Court of Appeals ignored these important arguments, petitioners respectfully request that the writ of certiorari be issued.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION SCHOOL DISTRICT, *Plaintiff-Appellant,* v. B. SMITH, defendants 2-7 UNDER SEAL, *Defendants-Appellees.*	No. 91-16546 D.C. No. CV-90-20390-JW OPINION 15 F 3d 1519
UNION SCHOOL DISTRICT, *Plaintiff,* v. B. SMITH, defendants 2-7 UNDER SEAL, *Defendants-Appellees,* and CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, BILL HONIG, *Defendants-Appellants.*	No. 91-16595

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
May 12, 1993 – San Francisco, California

Filed February 1, 1994

Before: Cecil F. Poole, Warren J. Ferguson, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Individual Rights/Disabilities/Government Law

The court of appeals affirmed a district court judgment. The court held that the family of a disabled child was entitled to reimbursement for tuition, transportation and lodging expenses incurred in placing the child in a private counseling facility not within commuting distance of the permanent family residence, after the school district failed to offer the child a free appropriate public education.

Appellant Union School District offered to place a disabled child in an educational program at Carlton School. Dissatisfied with that placement offer, the child's parents, who live in San Jose, placed the child in a private clinic in Los Angeles. The clinic was only certified to provide counseling, not special education.

The parents sought reimbursement of expenses incurred in sending their child to the private counseling facility. The district court granted summary judgment to the parents. The reimbursement included the child's transportation costs to and from the clinic each day, transportation costs of commuting between San Jose and

Los Angeles, and the parents' costs for lodging in Los Angeles.

The District appealed, contending that 1) the school district in which the child lived during the school week was the district responsible for his special education, 2) the District's program for autistic children, McKinnon, was an appropriate placement for the child, and the District did not offer it as a placement because the child's parents expressed unwillingness to accept it, and 3) the clinic was not an appropriate placement because it was not certified to provide special education, and counseling is only a "related service" under the Individuals with Disabilities Education Act (IDEA). Appellant California Department of Education also appealed, contending that the district court did not have the power to award the family reimbursement to maintain a second lodging so that the child could live within daily commuting distance of the clinic.

[1] The IDEA assures all handicapped children a free appropriate public education. [2] If a school district fails to offer such an education, parents may place an eligible child in an appropriate private program, with an equitable right to reimbursement for the costs.

[3] A school district has a responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district. [4] Under the ordinary measure of residency, the child's parents continued to reside within the District while the child attended the Los Angeles clinic.

[5] The child's placement at Carlton was inappropriate because it was insufficiently individually

designed to meet his special needs. [6] Moreover, the District never formally offered a placement at McKinnon. [7] The IDEA requires written prior notice to parents when an educational agency proposes an educational placement for a disabled child. The school district could not escape its obligation to make the formal offer by arguing that the child's parents expressed unwillingness to accept the McKinnon placement.

[8] California laws supplement the IDEA on matters of "related services," which California terms "Designated Instruction and Services" (DIS), and provide more stringent protection. Under California law, handicapped three- to five-year-old students may, when appropriate, be placed in a program that only provides DIS without simultaneous special education. Thus, the child's placement in the clinic was appropriate under California law, and therefore under the IDEA.

[9] Thus, the parents were entitled to reimbursement for tuition at the clinic because the District failed to offer them an appropriate placement and their placement of the child at the clinic was appropriate. [10] In addition, reimbursement for lodging and transportation was appropriate. [11] If a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are "related services" under the IDEA that are required to assist that child to benefit from the special education.

COUNSEL

Keith L. Slenkovich, Saratoga, California, for plaintiff-appellant Union School District.

Joyce O. Eckrem, Deputy General Counsel, California Department of Education, for State defendants-appellants.

Kathryn E. Dobel, Berkely, California, for the defendants-appellees.

OPINION

FERGUSON, Circuit Judge:

This case concerns the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, which guarantees handicapped children a free appropriate public education. Union School District ("District") appeals the district court's entry of summary judgment awarding reimbursement of expenses to a family who placed their handicapped child, Bernard Smith, in a private counseling facility after the District failed to offer Bernard a free appropriate public education. The California Department of Education ("CDE") also appeals, on narrower grounds, disputing the power of the district court to award a family reimbursement to maintain a second lodging so that Bernard could live within daily commuting distance of a non-residential education program.

I.

A.

The District argues that the district court's entry of summary judgment for the Smiths was improper. In the

District Court, the parties filed cross motions for summary judgment, anticipating that the court would base its decision on a review of the exhaustive administrative record. No party indicated that it wished to introduce further evidence. *See* 20 U.S.C. § 1415(e)(2) ("the court- . . . shall hear additional evidence *at the request of a party*") (emphasis added).

Notwithstanding this procedural posture, the District argues that there are disputed issues of material fact that render summary judgment improper. Specifically, the District points to the following factual disputes: 1) whether the District's convening of an Individualized Education Program ("IEP") meeting in September 1989 served as an acknowledgment that it was responsible for Bernard's education in the fall of 1989, and 2) whether the District's failure to make a formal offer of a placement for Bernard at the McKinnon school means that McKinnon cannot be considered in deciding whether the District offered a free appropriate public education.

These questions concern the legal significance of undisputed facts. When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *See* W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 475-80 (1983).

There are no disputed underlying facts. The District does not argue that the September IEP meetings did not occur, nor does it argue that it formally offered the McKinnon school as a placement for Bernard. We agree with the District that the district court erred in finding that the District admitted responsibility for Bernard's

education by conducting an IEP meeting in September of 1989. We affirm the district court's legal conclusion, however, that Bernard's residence was within the District on other grounds. We also affirm the district court's legal conclusion that the District cannot be considered to have offered McKinnon as a placement for Bernard.

The only other issue that the District even implicitly raised as a purported factual dispute involved the Smiths' withholding from the District of portions of a report issued by Dr. Bryna Siegel. The Smiths admit to withholding portions of the report that may have been relevant to the appropriateness of a placement at Carlton. This withholding is of no consequence, however, because the District formally offered Bernard a placement at Carlton. It is undisputed that the Smiths showed the District the pages in which Dr. Siegel diagnosed autism. The District points to nothing in the withheld portions of the report that might have influenced its decision formally to offer Bernard a placement at McKinnon. The District was aware that Bernard was diagnosed with autism. Its decision not to offer McKinnon formally as a placement was based on its beliefs that Bernard resided outside the District, and that the Smiths would not accept a placement there.

Furthermore, the District was legally obligated to procure its own report from a specialist such as Dr. Siegel. The District must make "a full and individual evaluation of the child's educational needs," 34 C.F.R. § 300.531, and must "ensure . . . [that the] evaluation [of the student] is made by a multidisciplinary team . . . including at least one teacher or other specialist with knowledge in the area of suspected disability" (i.e., a specialist

in autism). 34 C.F.R. § 300.532(e). Any failure of the Smiths to turn over portions of a specialist's report cannot excuse the District's failure to procure the same information for itself. *See W.G. v. Board of Trustees,* 960 F.2d 1479, 1484-85 (9th Cir. 1992) (parents' failure to secure participation of the child's school at an IEP meeting, even though promised by the parents, does not excuse the school district's obligation under the IDEA to secure such participation).

Because we find no factual dispute precluding summary judgment, we proceed to resolve this case on its legal merits.

B.

We review de novo the appropriateness of an education program. *Gregory K. v. Longview School Dist.,* 811 F.2d 1307, 1310 (9th Cir. 1987). We, like the district court, however, "must give 'due weight' to judgments of education policy when [we] review state hearings. . . . [C]ourts should not substitute their own notions of sound educational policy for those of the school authorities which they review." *Longview,* 811 F.2d at 1311 (internal quotation and citations omitted). The extent of deference to be given is within our discretion. *Id.*

We give deference to the administrative findings of the Hearing Officer particularly when, as here, they are thorough and careful. *See, e.g., Longview,* 811 F.2d at 1310-11; *W.G.,* 960 F.2d at 1483; *accord Hendrick Hudson Cent. Sch. Dist. Bd. of Ed. v. Rowley,* 458 U.S. 176, 206 (1982). We also accord deference to the policy decisions of a school district when it is acting within the bounds of

federal and state law. *See Wilson v. Marana Unified School Dist.*, 735 F.2d 1178, 1183-84 (9th Cir. 1984); *accord Rowley*, 458 U.S. at 207-08.

II.

[1] IDEA, 20 U.S.C. 1400 *et seq.*, assures all handicapped children a free appropriate public education. *See* 20 U.S.C. §§ 1400(c), 1412(1). Judicial review of state Hearing Officers' decisions under IDEA involves two steps. First, the court must determine whether the rigorous procedural requirements of IDEA have been met. Second, the court must determine whether the state has met the substantive component of IDEA – the requirement that the state provide an "appropriate" education. *Rowley*, 458 U.S. at 206-07.

"An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child. . . . The states are obliged to provide 'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.' " *Longview*, 811 F.2d at 1314, quoting *Rowley*, 458 U.S. at 201.

[2] If a parent believes that a school district has failed to offer a free appropriate public education, parents may place an eligible child in an appropriate private program. "Parents have an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education]." *W.G.*, 960 F.2d at 1485 (citing *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369 (1985)).

State standards that impose a greater duty to educate handicapped children, if they are not inconsistent with federal standards, are enforceable in federal court under IDEA. *See W.G.*, 960 F.2d at 1483; *see also* 20 U.S.C. §§ 1401(a)(18), 1412(6); 34 C.F.R. § 300.4.

III.

[3] The District argues at great length that the school district in which the child lives during the school week is the district responsible for the child's special education. The District argues that, because Bernard resided in Los Angeles during the school week while attending the Clinic, the District was not responsible for reimbursing the Smiths for the costs of Bernard's education at the Clinic. To support this contention, the District points to various provisions of the California Education Code addressing a school district's responsibility to disabled children who reside within the district. We find that those provisions in no way excuse a school district's responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district. *See, e.g., Taylor v. Honig*, 910 F.2d 627 (9th Cir. 1990) (requiring a school district to pay for a disabled child's placement in a residential program outside the district).

As the Hearing Officer and the district court found, the Smiths maintained their permanent resident in San Jose where they paid taxes and where Bernard's father continued his medical practice. They temporarily maintained a second residence in Los Angeles for the sole purpose of being able to commute daily to an appropriate

non-residential educational program for Bernard. We find no basis for holding that the determination of residency under IDEA or the California Education Code should be different from the ordinary determination of residency.[1]

[4] Under the ordinary measure of residency, we have no difficulty in affirming the district court's holding that the Smiths continued to reside within the District while Bernard attended the Clinic. *See* 27 Cal.Jur.3d (Rev.) Part 2, Domicile § 1-5.

IV.

The Hearing Officer and district court found reimbursement to the Smiths appropriate only after September 12, the date the Clinic became state certified to provide counseling. The Smiths do not contest the denial of reimbursement before this date. Therefore, the only time period in which we must determine the appropriateness of educational programs offered by the District is for the period after September 12 in the 1989-90 school year.

A.

During this period, the District's sole explicit offer (as set forth in its November 1 letter) was an educational program implementing Bernard's IEP through seventeen and

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[1] Our conclusion is buttressed by the declaration of Patrick Campbell, Director of Special Education for the California Department of Education, who stated that residency for special education coverage purposes is measured by the normal standards.

one-half hours a week in the Communicatively Handicapped Class at Carlton School, supplemented by some one-to-one behavior modification counseling.

The Hearing Officer found that this program was inappropriate. The Hearing Officer found that there were no other autistic children at Carlton and there was no evidence that the teacher had been trained to work with autistic children. Furthermore, the Hearing Officer heeded the testimony of the witnesses who had extensive experience with autistic children, who testified that the learning environment at Carlton was inappropriate for Bernard's individual needs:

> Bernard requires a more restrictive and less stimulating environment than that offered at Carlton. He requires full-time, one-to-one instruction and is unable to benefit from group instruction. . . . [A]ll of the witnesses recognized the need for Bernard to acquire attending skills prior to being able to benefit from language instruction. He has not yet attained these requisite skills. . . . Bernard had not . . . developed the requisite skills to benefit from placement in the class at Carlton.

[5] The substantive requirement of the IDEA is that a program be " 'individually designed to provide educational benefit to the handicapped child.' " *Longview,* 811 F.2d at 1314, quoting *Rowley,* 458 U.S. at 201. In light of the deference we grant the Hearing Officer as to judgments of educational policy, we find that Bernard's placement at Carlton was inappropriate because it was insufficiently individually designed to meet Bernard's special needs.

B.

[6] The District contends that McKinnon, the District's program for autistic children, was an appropriate placement Bernard. As the district court found, and the District concedes, the District never formally offered Bernard a placement at McKinnon. The District argues that it did not offer McKinnon because the Smiths expressed their unwillingness to consider it as a placement. Thus, the question we face is whether the District was required to make a formal offer under the IDEA.

[7] We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement. The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. *See* 20 U.S.C. § 1415(b)(1)(C). The Supreme Court has explained the great importance of such procedural components of the IDEA. "When the elaborate and highly specific procedural safeguards embodied in § 1415 [of the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." *Rowley,* 458 U.S. at 205.

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear

record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the . . . educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). For example, in this case, a formal offer of McKinnon would have served several purposes. It would have alerted the Smiths to the need to consider seriously whether McKinnon was an appropriate placement under the IDEA. The Smiths could not have been reimbursed for their unilateral placement of Bernard at the Clinic if McKinnon were an appropriate placement. Also, if a formal offer were made, the Smiths could have decided whether to oppose McKinnon or to accept it with the supplement of additional education services. Finally, by making a formal offer, the District would have been more prepared to introduce sufficient relevant evidence to the Hearing Officer of the appropriateness of McKinnon as a placement for Bernard.[2]

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[2] The Hearing Officer was unable to make a determination of the appropriateness of placing Bernard at McKinnon because the District failed to set forth sufficient evidence concerning McKinnon. Given that the Hearing Officer, an expert on educational policy and practice, was unable to make an informed decision on the appropriateness of McKinnon based on the evidence before her, we are quite hesitant to do so on that same record.

V.

The Smiths, dissatisfied with the District's placement offering, unilaterally placed Bernard in the Clinic. In order for the District to be responsible for reimbursing the Smiths for their expenses in placing Bernard in the Clinic, the Clinic must provide an "appropriate alternative educational program." *W.G.*, 960 F.2d at 1486.

As a preliminary matter, there is little room to dispute that Bernard's instruction at the Clinic was "individually designed to provide educational benefit to the handicapped child," as required by *Longview.* 811 F.2d at 1314. Bernard's counseling was individually designed because it implemented the specific program that Siegel and other autism experts thought most beneficial for Bernard. The educational benefit Bernard received from the Clinic was demonstrated by his significant progress in language skills, and increased cooperation and interaction with peers.

The District argues, however, that the Clinic cannot be an appropriate placement for Bernard because it was not certified to provide special education. The Supreme Court has rejected this position. It held that when a parent places a child in a private setting, reimbursement may be ordered even though the private institution does not satisfy the state education standards. *Florence County Sch. Dist. Four v. Carter,* 114 S.Ct. 361, 365 (1993). Nevertheless, the Smiths have not appealed the denial of reimbursement for the period before the clinic became certified to provide counseling.

We must review, however, the district court's finding that the Clinic became an appropriate placement after

September 12 when it became certified to provide counseling, a "related service" to special education under IDEA. *See* 20 U.S.C. § 1401(17) (listing counseling as a related service). The District argues that federal regulations construing IDEA mandate that it is inappropriate to place a child solely in a related service when not in conjunction with special education itself. *See* 34 C.F.R. § 300.13; 34 C.F.R. § 300.14.

As explained above, the Supreme Court recently held that the appropriateness of a placement does not depend on whether the institution satisfies the state education standards. *Carter,* 114 S.Ct. at 365. In this case, however, this issue is best addressed under state law. "[S]tate procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and [are] thus enforceable." *Antkowiak v. Ambach,* 838 F.2d 635, 641 (2d Cir.), *cert. denied,* 488 U.S. 850 (1988).

[8] California laws supplement IDEA on matters of related services, which California terms "Designated Instruction and Services" ("DIS"), and provide more stringent protection. *See* Cal. Educ. Code §§ 56026, 56361, 56441.11(b) (West Supp. 1993). These statutory provisions, when read in conjunction, mandate that under California law, handicapped three to five year old students may, when appropriate, be placed in a program that only provides DIS without simultaneous special education. This is also supported by the Declaration of Patrick Campbell, Director of Special Education for the California Department of Education, who stated that the CDE has always interpreted these statutes in this manner. Because this state law scheme is not inconsistent with IDEA, we will enforce it. Bernard's placement in the Clinic, which was

only certified to provide the DIS of counseling and not special education itself, was appropriate under California law, and therefore under IDEA.

VI.

A.

[9] The Supreme Court has held that a court may order a school district to reimburse parents who have unilaterally placed their child in an appropriate private special education after the school district has failed to offer an appropriate public education. *Burlington School Committee v. Department of Education*, 471 U.S. 359, 369 (1985). The Smiths are entitled to reimbursement for tuition at the Clinic because the District failed to offer them an appropriate placement and the Smith's placement of Bernard at the Clinic was appropriate.

B.

The Hearing Officer and the district court also found that the Smiths were entitled to reimbursement for transportation costs to and from the Clinic each day, the transportation costs of commuting between San Jose and Los Angeles at the beginning and end of Bernard's participation in the program and when the school is officially closed to students (i.e. Thanksgiving, winter and spring breaks), and to reimbursement for the cost of lodging for Bernard and Mrs. Smith in Los Angeles.

[10] The District and the CDE contend that the district court was without power to award the Smiths reimbursement for lodging and transportation. We find that this reimbursement was appropriate.

[11] Under the IDEA, a "free appropriate public education" includes not only special education, but also "related services." Related services include "transportaiton . . . and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(a)(17). If a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education.

The legislative intent underlying the IDEA supports this finding. The IDEA explicitly states: "Congress finds that . . . because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense." 20 U.S.C. § 1400(b)(6). "It is the sole purpose of [the IDEA] to assure that *all* children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c) (emphasis added). Therefore, we find that the language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses in this case as related services.

Our holding is consistent with this court's recent decision in *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993). In *Jackson* the court ordered Ojai Unified

School District to pay tuition, room, board, transportation and caretaking fees for a developmentally disabled student to attend the Foundation for the Junior Blind in Los Angeles. The court found that the public school system was not providing the student with a minimum level of educational benefit and that the Foundation, located approximately eighty-five miles from the child's home, was an appropriate educational placement. The Foundation's residential program was full and, in light of the child's fragile health, the court found that a daily commute was not feasible. Therefore, the court ordered the school district to pay the student's costs of living with his grandparents, approximately twenty miles from the Foundation and, thus, temporarily extended the reach of the Foundation's residential program.

VII.

The Smiths' request for attorneys fees incurred in defending the District's appeal is granted. The case is remanded to the district court for determination of the amount of the appellate fee award. *See Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 590 (9th Cir. 1992).

For the foregoing reasons, we affirm the district court's entry of summary judgment for the Smiths and remand for a determination of the amount of the appellate fee award.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION SCHOOL DISTRICT, Plaintiff-Appellant, v. B. SMITH, defendants 2-7 UNDER SEAL, Defendant-Appellee, v. CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, BILL HONIG, Defendant-Appellant.	No. 91-16546 D.C. No. CV-90-20390-JW ORDER (Filed June 9, 1994)

Before: POOLE, FERGUSON, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing.

Judges Poole and Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Ferguson so recommends.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNION SCHOOL DISTRICT, Plaintiff, v. BERNARD SMITH, *et al.*, Defendants.	CASE NO. C 90 20390 JW ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Aug. 28, 1991)

This case arises under the Individuals With Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. § 1400 *et seq.* Defendants Dr. and Mrs. Smith are parents of an autistic child who is eligible for free and appropriate special education services under the IDEA. The Smiths were petitioners in a state administrative proceeding before the California Special Education Hearing Unit.

The Smiths prevailed in the administrative hearing and plaintiff Union School District appeals that decision to this Court in the instant action.

BACKGROUND FACTS

Bernard Smith is a five-year-old child who lives with his parents in the Union School District (District). When Bernard was two years old his parents became concerned about his failure to develop speech and language skills, his inappropriate behavior and his delayed social development (Transcript of Record 3-144) ("TR"). In February

1989, the Smiths contacted the local school district for psychometric, speech, and behavioral evaluations of Bernard (TR 3-145).

Barbara Milligan, the District's school psychologist evaluated Bernard during the Spring of 1989. She had difficulty assessing Bernard because he was uncooperative during administration of the diagnostic tests (TR 2-6). She was able to determine, however, that Bernard had deficits in the areas of self-help, social behavior, and communication skills. (Milligan Report, April 4, 1989). Ms. Milligan was reluctant to diagnose Bernard as autistic or retarded because he was under the age of three and because she experienced difficulty testing him (TR 2-13). It was her experience that assessing children like Bernard through participation in a program was often more successful than attempting an assessment through short sessions with a child psychologist. Therefore, Ms. Milligan felt she should take immediate steps to find a diagnostic placement for Bernard in order to further the assessment process (TR 2-8, 2-9).

The District's language specialist Joan Bowen and program specialist Joe Pacheco also had difficulty assessing Bernard. They were unable to administer standardized testing instruments and procedures. They therefore observed Bernard's play, and considered information Bernard's parents provided them. Based on this information, the specialists concluded that Bernard's language was at the one-year level and that Bernard was "not interacting communicatively with his environment to the extent necessary for normal speech and language development." (Bowen and Pacheco Report, March 31, 1989).

At the first Individual Education Program (IEP) team meeting convened on April 3, 1989, Bernard was found eligible for special education on the basis of language and attending deficits. The IEP team, consisting of Bernard's mother, Mrs. Smith, school psychologist Barbara Milligan and program specialist Cathi Serpa, developed goals for Bernard in the areas of self-help, attending, and communication. The team recommended placement in an early childhood special education program three days per week. The team also found him eligible for the extended school year and recommended speech language consultation and services as appropriate. The Smiths consented to the IEP goals and objectives. With respect to finding a placement for Bernard, Cathi Serpa set up an appointment for Mrs. Smith to visit early education classes at the Coventry School (TR 4-198).[1] Serpa testified that Mrs. Smith felt that Bernard was cognitively ahead of the children in these classes and therefore rejected them (TR 4-199 to 4-201). Mrs. Smith testified, however, that the Coventry officials felt the early education classes were not appropriate for Bernard (TR 3-168).

Mrs. Smith also testified that the Coventry School nurse and psychologist believed Bernard was autistic or autistic-like. They therefore recommended that she visit the preschool autistic program at the Mckinnon School before a decision was made about placing Bernard in an early education program (TR 3-163, 3-165). Feeling a

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[1] As a Program Specialist, Serpa was familiar with all the possible educational options in a county and facilitates placement of infants and other children needing special education services (TR 4-178).

sense of urgency, Mrs. Smith then made her own arrangements to visit Mckinnon (TR 3-163). She testified that at the Mckinnon preschool class she saw a lot of mute children, and that she saw children doing stereotypic movements, constant jumping, and hand flapping (TR 3-166). Mrs. Smith felt that her son was not like these children (TR 3-163). Cathi Serpa, who had co-written the April IEP, did not recommend nor propose the Mckinnon School for Bernard's initial diagnostic placement (TR 4-198 to 4-202).

Eventually, the District placed Bernard in a preschool class for the visually impaired at Coventry School. Because Bernard was under an infant IEP, he attended school three days per week for three hours daily (TR 3-168, 4-202).

In addition to the school district's evaluations, the Smiths sought the medical opinion of two experts. Bryna Siegel, Ph.D., and Glen R. Elliott, Ph.D., M.D., of the Pervasive Development Disorder Clinic, University of California, San Francisco, evaluated Bernard on April 26, 1989. Using DSM III-R criteria, they concluded that Bernard exhibited eleven of sixteen criteria for the diagnosis of an autistic disorder. Their report states that their testing also showed moderate mental retardation. Seigel and Elliot also noted Bernard's hyperarousability, resistance to change, and degree of connectedness with his parents, and concluded that he is "likely to be relatively high functioning when older (Siegel and Elliott Report, May 12, 1989)." Siegel and Elliott recommended an educational environment that provided extensive one-to-one instruction with focus on language pragmatics. Drs. Siegel and Elliott indicated that Bernard may be a good

candidate for the Clinic for Behavioral Treatment of Children in Los Angeles (Clinic) "which uses behavioral techniques to help overcome some of the negativistic and disconnected behaviors of autistic children (Siegel and Elliott Report, May 12, 1989)."

On June 1, 1989, the Smiths took Bernard to the Los Angeles Clinic for the purpose of determining whether Bernard would be an appropriate candidate for the Clinic's program. The Clinic staff assessed Bernard and interviewed the Smiths.

The District held a second IEP meeting on June 6, 1989. The IEP team incorporated the goals developed on April 3, 1989, into the new IEP and noted that Bernard had made some progress towards those goals. The team recommended "small group instruction with Special Day Class (SDC) with teacher specialist; small group instruction with speech pathologist or consultation as appropriate for 60 minutes per week; and extended school year for four weeks." The Smiths consented to the IEP goals and objectives but requested a 40 hour a week, one-on-one, intensive behavior modification program, socialization activities, and speech and language services (TR 3-183).

In late June of 1989 Bernard was accepted at the Clinic in Los Angeles for a three month trial period. The Smiths felt that the Clinic was an appropriate placement for Bernard. Therefore, on June 26, 1989 Bernard began the program. Mrs. Smith rented an apartment in Thousand Oaks in which she, Bernard, and his infant sister stayed during the week while Bernard participated in the Clinic program and Mrs. Smith received parent training.

In July 1989, Dr. Smith wrote a letter to the school district asking to meet to discuss Bernard's treatment at the Clinic and requesting payment for Bernard's treatment at the Clinic. Lyle Chambers, District Director of Special Services, responded to Dr. Smith's requests and stated that after consulting with the State Department of Education, he concluded that the District could not implement the IEP developed for Bernard because he was not a resident of the District and because the Clinic was not certified to provide special education. By letter dated August 15, 1989, Dr. Smith then requested an immediate IEP meeting and asserted that the District violated Bernard's rights to identification and assessment of his handicapping condition, as well as development and implementation of the IEP.

On September 21, 1989, the District held a third IEP meeting. The team decided that Bernard needed to be assessed in speech and language areas. Joan Bowen, the District's Speech and Language Specialist, evaluated Bernard and found that Bernard had made remarkable improvement in the area of language. She also noted social growth and indicated that Bernard was cooperative and responsive during testing.

The IEP reconvened on September 29, 1989. Bernard's basis for Special Education eligibility was changed to "delays," with a sub-classification of autistic. Goals and objectives addressing socialization, preacademic skills, self-help, receptive and expressive language were developed. The team recommended placement in a highly structured preschool Special Day Class and a behavioral intervention program for Bernard, which included parent

consultation. The Smiths agreed with the goals and objectives developed at that meeting, but withheld their consent to the IEP based on their objections to the description of the proposed educational program for Bernard.

By letter dated November 1, 1989, the District offered to place Bernard at Carlton Elementary School in a Communicatively Handicapped (CH) Special Day Class upon Bernard's return to the District. He also indicated that a behavior management consultant, would be available to work with Bernard's teacher and the Smiths.

The Smiths did not feel the proposed placement at Carlton was appropriate. The Smiths requested a due process hearing on October 13, 1989, regarding the issue of the appropriate educational placement for Bernard. They asserted claims for travel, living, and treatment costs for Bernard, his mother, and his infant sister while living and receiving treatment in Los Angeles.

On June 18, 1990, the hearing officer found, *inter alia*, that 1) the Union School District did not offer an appropriate educational placement for Bernard; 2) the Clinic in Los Angeles was an appropriate placement for Bernard for the 1989-1990 school year, 3) commencing with September 12, 1989, the date the Clinic was certified, the District was required to pay for the travel, living, and treatment expenses of the Smith's in Los Angeles, and 4) the District is responsible for the costs of the assessment made by Drs. Siegel and Elliott.

The District has appealed the hearing officer's decision to this Court.

LEGAL OVERVIEW

In 1975, Congress enacted the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq*. This act was recently renamed the "Individuals With Disabilities Education Act" (IDEA). One purpose of the IDEA is to assure that all disabled children have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Under the IDEA, states receive federal monies to provide special education services. The IDEA and its implementing regulations, 34 C.F.R. §§ 300.1 *et seq*., set forth procedural and substantive standards for educating handicapped pupils. The IDEA also incorporates the states' substantive and procedural standards concerning the education of handicapped pupils. 20 U.S.C. §§ 1401(a)(18) and 1412 (6); 34 C.F.R. § 300.4; *see also, Gregory K. v. Longview School District*, 811 F.2d 1307, 1309 (9th Cir. 1987).

1. Jurisdiction and Standard of Review

This Court has jurisdiction to review the decision of the California Special Education Hearing Office pursuant to 20 U.S.C. § 1415(e)(2). That section provides in pertinent part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate.

Further, under section 1415, federal courts have the authority to enforce both the federal requirements under the IDEA and "relevant" state law regarding the education of handicapped pupils. " 'Relevant' state law is law that is not inconsistent with the federally mandated requirements." *Town of Burlington v. Department of Education Commonwealth of Mass*, 736 F.2d 773, 780 (1st Cir. 1984). State law, however, may provide greater protections than the federal requirements. *Id.*

Concerning the proper weight to be given the state administrative findings, the First Circuit articulated the following standard:

> Because Congress intended courts to make bounded, independent decisions – bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court – the question of the weight due the administrative findings of facts must be left to the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

736 F.2d at 791. This Court will use the *Burlington* standard as a guide in its independent review of the administrative record.

2. Summary Judgment

Summary judgment is appropriate if the records and files show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The ultimate issue in an EHA placement case is whether the public school district can provide a "free appropriate public education" to eligible individuals. This issue raises a mixed question of law and fact. *Gregory K.* [sic] *Longview School District,* 811 F.2d 1307, 1309 (9th Cir. 1987). Courts have often been hesitant to grant summary judgment on mixed questions of law and fact "when the record has not been sufficiently developed to allow a fully informed decision on an outcome determinative issue." *Bertolucci v. San Carlos Elementary School District,* 721 F. Supp. 1150, 1153 (N.D. Cal. 1989), *citing* W. Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 475 (1983). In cases brought under the IDEA, however, the district court has an extensive administrative record before it. For example, the court in this case has a 1415 page transcript, 68 exhibits and a 45 page hearing decision to review. Thus, because the instant record is fully developed the concern regarding the appropriateness of summary judgment is not present.

The Court's role in this case is to review independently the evidence introduced at the administrative hearing. The Court finds that there are no historical facts in dispute that relate to the issue of the appropriate program for Bernard and that the differences between the experts can be resolved without an assessment of witness credibility or demeanor. Therefore, a trial is unnecessary

and summary judgment is appropriate in this case. *Bertolucci,* 721 F. Supp. at 1153.

ANALYSIS

Bernard's Residency

The District contends that because Bernard lived in Los Angeles during the weekday while he attended the Clinic he resided in Los Angeles during the 1989-1990 school year. Therefore, the District asserts that the Los Angeles Unified School District was responsible for his education during that period. The Smiths, on the other hand, contend that Bernard resided and still resides within the District because the Smiths' permanent residence is in San Jose.

Here, the hearing officer found and the record shows that the Smiths' residency did not change even though Mrs. Smith, Bernard, and his sister temporarily lived in Los Angeles in order for Bernard to attend the Clinic. The evidence establishes that the Smiths reside within the jurisdictional boundaries of the Union School District. The Smiths' have declared that San Jose is their permanent residence. They own and live in a house there. Dr. Smith has a medical practice nearby. The Smiths vote and pay taxes in San Jose. The Smiths have neither divorced nor separated. Mrs. Smith, Bernard and his sister temporarily stayed in Los Angeles during the school week in 1989-1990 solely for the purpose of Bernard's attending the Clinic. Further, Bernard, has sister and mother returned to San Jose on weekends and holidays.

The hearing officer found that "the fact that the Smiths' disagreed with the placement proposed by the District does not dictate that their residency has changed for purposes of assigning responsibility for Bernard's education (Hearing Officer Decision p. 24)." The Court finds this reasoning persuasive in light of the Smiths' clear intention not to remain permanently in Los Angeles.

Moreover, although the District strongly contends that it was relieved of responsibility for Bernard when his parents placed him in the Clinic, the District clearly acknowledged its responsibility for Bernard in the fall of 1989. During September and October of 1989, the District convened two IEP meetings, assessed Bernard, and formally proposed a placement for Bernard for the 1989-1990 school year.

Accordingly, the Court finds that Bernard's residency during 1989 and 1990 was the permanent address of his parents in San Jose. Therefore, the Union School District was responsible for the education of Bernard during 1989-1990 school year.

Hearing Officer's Amendment to the September IEP

The Smiths contend the that [sic] parameters of the September 1989 IEP did not define an appropriate educational placement for Bernard for the 1989-1990 school year. The hearing officer found that Bernard requires a 40-hour-per-week program instead of the 17.5 hour-per-week program that the District proposed. Further, the hearing officer found that "Bernard requires full-time, one-to-one assistance throughout his program rather than the unspecified amount of 'daily one-to-one instruction'

indicated in the Districts September IEP (Hearing Officer Decision p. 25). Finally, the hearing officer ordered that the parent training component of Bernard's program be increased from one hour weekly to five hours weekly, and that at least one-half of the parent training was to occur in Bernard's home. She based these decisions on the benefit Bernard experienced from his participation in the 40 hour per week program at the Clinic and the 'persuasive testimony' of the autism experts, Drs. Seigel and Kirchner. In addition, the hearing officer extended the amended September IEP through August 31, 1990.

Although the District's witnesses at the administrative hearing disputed the Smiths' proposed parameters of placement, the District in its motion for summary judgment does not raise any issues concerning the amendments to the IEP set forth in the hearing decision. The Court has independently reviewed the expert testimony regarding the IEP amendments and agrees with the findings of the hearing officer.

Proferred Educational Placements

The Smiths contend that the District formally offered only two placements, Coventry and Carlton, and that neither was an appropriate placement for Bernard. The District, on the other hand, contends only that it has programs, such as Mckinnon, which serve autistic children, and that it "reviewed" these programs with the Smiths, who rejected them.

The record shows that the District did not offer the Smiths its autistic programs. Bernard's program specialist

involved in the spring IEP recommended an early education class at Coventry School. When the Smiths visited Coventry, the school nurse and psychologist suggested they visit the preschool autistic program at Mckinnon (TR 3-163, 3-165). The record does not support the District's contention that it "reviewed" the McKinnon program with the Smiths. In fact, Bernard's program specialist, Cathi Serpa, did not recommend Mckinnon as an initial placement option for Bernard (T4-198-202).

With respect to Bernard's placement as a result of the September IEP, it is clear that the District only offered the Carlton program. The District, by letter dated November 1, 1989, offered the Carlton communicatively handicapped preschool class. The letter did not mention the possibility of placement at any other programs. Furthermore, the testimony of school officials who were most familiar with Bernard's case supports the contention that Carlton was the only program offered. First, Lyle Chambers, the Director of Special Services, testified that the Carlton class was, in his opinion, the most appropriate program available to meet Bernard's September IEP (TR 2-260). Second, Joe Pacheco, a program specialist involved in Bernard's placement, testified that he recommended a communicatively handicapped class rather than a class for autistic children because he believed that Bernard is less like a severely autistic child and has needs that are similar to communicatively handicapped children. Finally, Cathi Serpa testified that she considered other programs before recommending the Carlton class but felt that the McKinnon class was too restrictive for Bernard. She did not recommend McKinnon's preschool

autistic class because Bernard's primary areas of deficit are in language and attending.

Accordingly, the Court finds that the District offered the Smiths only the Carlton program as a placement for the 1989-1990 school year.

Appropriateness of Program Offered for School Year 1989-1990

As stated above the only program offered for school year 1989-1990 was the Carlton placement. The Smiths contend that Carlton was not an appropriate placement for Bernard. The District does not controvert this contention. The hearing officer found that the proposed Carlton placement was inappropriate. She found that Bernard needed to learn appropriate behaviors, socialization and communication skills in a one-to-one situation before he could benefit from group instruction in a pre-school class. After an independent review of the expert testimony, the Court agrees with the hearing officer that the Coventry and Carlton placements were not appropriate for Bernard.

Appropriateness of the Clinic

1. Is the Clinic an Allowable 'Related Service'?

The District contends that Bernard's IEP cannot be implemented at the Clinic because the Clinic is exclusively medical and therefore not an authorized 'related service' under federal law. The Smiths do not directly address this issue; however, they contend that the Clinic

is an authorized 'related service' under federal law. Furthermore, the Smiths contend that Bernard's IEP can be implemented at the Clinic because the Clinic provides 'designated instruction and services' (DIS) authorized under California Special Education law.

The IDEA requires state educational agencies to offer handicapped children free appropriate education, including 'related services.' 20 U.S.C. § 1401. Title 20 United States Code § 1401(18) defines 'related services' as "transportation, and such developmental, corrective, and other supportive services . . . including . . . counseling services . . . as may be required to assist a handicapped child to benefit from special education."

As previously stated, the IDEA incorporates the state's substantive and procedural standards concerning the education of handicapped children. California Education Code § 56441.8 provides that early education services for preschoolers may be provided by, among others, a certified nonpublic agency. In addition, Cal. Educ. Code § 56361 provides that 'designated instruction and services' (DIS) authorized under section 56363 can be a special education program option for implementing an IEP. Cal. Educ. Code § 56363(a) sets forth the (DIS) provision:

> Designated instruction and services as specified in the individualized education program (IEP) shall be available when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program. . . . [T]he appropriate designated instruction and services specialist shall provide such instruction and services.

California Education Code § 56363(b)(9)(11) provides that these services may include counseling, as well as parent counseling and training. Counseling as a DIS is addressed by three sections of the California Regulations implementing Special Education statutes: section 3051.9 defines Counseling and guidance Services; section 3051.10 defines psychological services as including "Counseling provided to an individual with exceptional needs by a credentialed or licensed psychologist or other qualified personnel; (b) Consultative services to parents, pupils, teachers, and other school personnel; (c) Planning and implementing a program of psychological counseling for individuals with exceptional needs and parents;" section 3051.11 authorizes Parent Counseling and Training, which may include "(a) Assisting parents in understanding the special needs of their child, and (b) Providing parents with information about child development."

The record shows that the Clinic is not exclusively "medical." There is no testimonial evidence that the Clinic is a medical treatment program. Furthermore, since September 12, 1989, the Clinic has been certified as a nonpublic agency to provide counseling services. The IDEA provides that counseling is an authorized 'related service'. Therefore, the Court finds that the District's contention that the Clinic is exclusively "medical" is without merit.

On the other hand, the Smiths' contention that Bernard's IEP can be implemented at the Clinic because the Clinic provides a DIS program does have merit. Section 56363 contemplates a situation where it is not feasible for the regular class teacher the special class teacher, or the resource specialist to provide the required 'designated

instruction and services' specified in the IEP. In such a situation, section 56363 states that "the appropriate DIS specialist shall provide such instruction and services."

Here, the appropriate DIS specialist was the Clinic. Bernard's IEP includes a 40 hour per week, intensive one-on-one behavior modification program. It has been established that the placements offered by the District did not include such a program and were therefore inappropriate. The Clinic is a certified nonpublic agency which provides counseling services. The services Bernard and his mother received at the Clinic fall within the services identified as counseling in the above California regulations. In the 40 hour a week, one-on-one program, "the clinic provides intensive behavior modification to teach Bernard compliance and attending skills. His program also stresses development of language, self-help, and socialization skills. The parent component of the program teaches Mrs. Smith how to reinforce the skills Bernard learns at the Clinic and trains her in behavioral management strategies." (Hearing Officer Decision p. 35). The program also includes participation in a preschool class.

2. Certification of the Clinic

The District contends that in June 1989, when the Smiths enrolled Bernard in the Clinic, the Clinic was not certified by the State of California to provide any services to handicapped children. Therefore the District contends that it could not have placed Bernard at the Clinic.

The Clinic was not certified to provide counseling services to handicapped children until September 12,

1989. Consequently, the hearing officer found that reimbursement before September 12, 1989 was inappropriate. The hearing officer, however, ordered reimbursement for costs related to Bernard's participation in the Clinic after its September 12, 1989 certification.

The record shows that the District could have properly placed Bernard in the Clinic for the school year 1989-1990. Under the IDEA and California Special Education law, a person or institution who provides services to handicapped students must be state certified. The Clinic was state certified to provide counseling services to handicapped children on September 12, 1989. Therefore, after Bernard's September 28, 1989 IEP the District could have enrolled Bernard in the Clinic if it had determined that the Clinic was an appropriate placement. Accordingly, the Court finds that the District's contention lacks merit.

Reimbursement for Lodging and Associated Costs

The District and the California Department of Education (CDE) contend that the hearing officer misapplied California's 'in lieu transportation' statutes when she awarded the Smiths reimbursement for lodging and associated costs in Los Angeles. The Smiths assert that under federal and state law they are entitled to reimbursement for lodging and related costs in lieu of daily transportation from their home in San Jose to the Clinic in Los Angeles.

Under federal and state law, handicapped children who are eligible for special education and or related services shall receive such services at no costs to the

parents. 20 U.S.C. §§ 1400 *et seq.*; Cal. Educ. Code § 56040. In some circumstances, a school district may be required to provide the related service of transportation. 34 C.F.R. Part 300.13(a). Under California education law, transportation can include lodging to handicapped pupils in lieu of providing the pupils with transportation between the pupil's home and the regular full-time day program he or she attends. Cal. Educ. Code § 41850(b)(3) and (d). The costs for lodging in lieu of transportation cannot exceed the daily transportation costs from the student's home to the school he attends. Cal. Educ. Code § 39807.

As stated above, Bernard required a 40 hour a week, one-on-one, intensive behavior modification program with a parent training component. The Clinic was the only appropriate program proposed for Bernard during the course of the administrative proceedings. Unfortunately, the Clinic was four hundred miles away from the Smiths' home in San Jose.

Bernard requires the related service of transportation in accordance with 34 C.F.R. Part 300.13(a). Neither the District nor the CDE dispute this conclusion. Daily transportation of Bernard from his home in San Jose to the Clinic in Los Angeles is not feasible. California Education Code § 41850 contemplates a situation where excessive distances are involved and allows apportionments for a school district which provides lodging to handicapped pupils in lieu of transportation services. Accordingly, the Court finds that the hearing officer correctly applied the California 'in lieu transportation' statutes when she ordered reimbursement for Bernard's lodging and associated costs.

Because Bernard required the participation of a parent in the Clinic program, the hearing officer found that Mrs. Smith's lodging costs should be reimbursed. The California 'in lieu transportation' statutes provide only for student lodging costs. However, since the parent component of Bernard's IEP is a critical aspect of his IEP, the Court finds that reimbursement for Mrs. Smith's lodging is allowable under California 'in lieu transportation' statutes.

CONCLUSION

Plaintiff Union School District's motion for summary judgment is denied. Defendant California Department of Education's motion for summary judgment is denied. Defendant Bernard Smith's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ James Ware
JAMES WARE
UNITED STATES
DISTRICT JUDGE

DATED: August 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNION SCHOOL DISTRICT, Plaintiff, v. BERNARD SMITH, *et al.*, Defendants.	CASE NO. C 90 20390 JW JUDGMENT (Filed Aug. 28, 1991)

Pursuant to the Court order of this date, "Order Re: Cross Motions For Summary Judgment," judgment is HEREBY ENTERED in favor of defendant Bernard Smith and against plaintiff Union School District and defendant California Department of Education.

IT IS SO ORDERED.

/s/ James Ware
JAMES WARE
UNITED STATES
DISTRICT JUDGE

DATED: 8/28/91

APPENDIX C

RELEVANT STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. Chapter 33

SUBCHAPTER I – GENERAL PROVISIONS

Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that –

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities and to

assess and assure the effectiveness of efforts to educate children with disabilities.

Sec. 1401. Definitions

(a) As used in this chapter –

* * *

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

* * *

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Sec. 1414 – Applications

* * *

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency –

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

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34 C.F.R. Part 300

Sec. 300.16 Related services

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services,

social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes –

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes –

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes –

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes –

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes –

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes –

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes –

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(a)(17))

Note: With respect to related services, the Senate Report states:

The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions. (S. Rep. No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Sec. 300.302 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

CALIFORNIA EDUCATION CODE

PART 30. SPECIAL EDUCATION PROGRAMS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Intent

56000. The Legislature finds and declares that all individuals with exceptional needs have a right to participate in free appropriate public education and that special educational instruction and services for these persons are needed in order to ensure them of the right to an appropriate educational opportunity to meet their unique needs.

It is the intent of the Legislature to unify and improve special education programs in California under

the flexible program design of the Master Plan for Special Education. It is the further intent of the Legislature to assure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

It is the further intent of the Legislature that nothing in this part shall be construed to abrogate any right provided individuals with exceptional needs and their parents or guardians under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). It is also the intent of the Legislature that nothing in this part shall be construed to set a higher standard of educating individuals with exceptional needs than that established by Congress under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

* * *